

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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BETTY J. MARTIN,

Plaintiff,

v.

CAROLYN W. COLVIN,
Acting Commissioner of Social Security,

Defendant.

Case No. 2:14-cv-01092-MMD-NJK

ORDER

I. SUMMARY

Before the Court is Magistrate Judge Nancy J. Koppe's Report and Recommendation ("R&R") (ECF No. 28) regarding Plaintiff Betty J. Martin's Motion for Reversal and/or Remand of the Commissioner's Decision (ECF No. 15), and a Cross-Motion to Affirm filed by Defendant Commissioner Carolyn W. Colvin ("Commissioner") (ECF No. 20). The Court has also reviewed Plaintiff's objection to the R&R (ECF No. 29), and Defendant's response (ECF No. 30).

II. BACKGROUND

The following facts are taken from the R&R. Martin filed an application for Social Security Disability Insurance Benefits in February 2011. The Social Security Administration denied Martin's claims upon initial review and upon reconsideration. Martin then appeared before an administrative law judge ("ALJ") on August 15, 2012.

Martin alleged that she suffered from essential hypertension and pulmonary hypertension, as well as other obesity-related impairments. (ECF No. 14-1 at 22.)¹

¹For ease of reference, the Court will cite to the administrative record ("AR") by its electronic filing number: ECF No. 14-1.

1 Martin presented the ALJ with an opinion by Dr. Willoughby, her primary treating
 2 physician, who concluded that her impairments could lead her to be absent from work for
 3 approximately three days each month. (*Id.* at 318.) The ALJ found that Martin's obesity-
 4 related impairments were not severe enough to be considered disabilities, but allowed
 5 her case to proceed based on her essential hypertension and pulmonary hypertension.
 6 (*Id.* at 24.) The ALJ then found that Martin maintained the residual functional capacity to
 7 perform sedentary work. (*Id.* at 23.) In making his determination, the ALJ discounted Dr.
 8 Willoughby's opinion on Martin's absenteeism and Martin's credibility regarding her
 9 subjective pain. (*Id.* at 23-26.) In a decision issued on September 12, 2012, the ALJ
 10 found that Martin was not disabled for the purposes of her application. The ALJ's
 11 decision became final when the Appeals Council denied Martin's request for review.
 12 Martin then sought review from this Court.

13 Magistrate Judge Koppe issued the R&R on July 28, 2015, finding that the ALJ's
 14 decision was supported by substantial evidence in the administrative record. (ECF No.
 15 28.) Specifically, Judge Koppe found that the ALJ had properly rejected the treating
 16 physician's opinion and evaluated Martin's pain in the credibility assessment. The R&R
 17 recommends that Martin's Motion for Reversal and/or Remand (ECF No. 15) be denied,
 18 and that the Commissioner's Cross-Motion to Affirm (ECF No. 20) be granted. For the
 19 reasons stated below, the Court will accept and adopt the R&R in full.²

20 **III. LEGAL STANDARD**

21 This Court "may accept, reject, or modify, in whole or in part, the findings or
 22 recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). Where a party
 23 timely objects to a magistrate judge's report and recommendation, the court is required
 24 to "make a de novo determination of those portions of the [report and recommendation]

25 ²The R&R further details the procedural history of Martin's claims, a complete
 26 summary of the ALJ's findings and relevant testimony, and the applicable standards set
 27 out by the Social Security Act. (ECF No. 28 at 1-6.) These portions of the R&R are not in
 28 dispute, and the Court adopts them in full. *See United States v. Reyna-Tapia*, 328 F.3d
 1114, 1121 (9th Cir. 2003) (a district court is not required to review a magistrate judge's
 report and recommendation where no objections have been filed).

1 to which objection is made.” 28 U.S.C. § 636(b)(1). In light of Martin’s objection, the
2 Court will review *de novo* the two portions of the R&R relevant to the objection.

3 Congress has provided a limited scope of judicial review of the Commissioner’s
4 decision to deny benefits under the Social Security Act. In reviewing findings of fact, the
5 Court must determine whether the Commissioner’s decision is supported by substantial
6 evidence. 42 U.S.C. § 405(g). “Substantial evidence is more than a mere scintilla but
7 less than a preponderance; it is such relevant evidence as a reasonable mind might
8 accept as adequate to support a conclusion.” *Gutierrez v. Comm’r of Soc. Sec.*, 740 F.3d
9 519, 522–23 (9th Cir. 2014) (quoting *Hill v. Astrue*, 698 F.3d 1153, 1159 (9th Cir. 2012)).
10 The Court must consider the entire record as a whole to determine whether substantial
11 evidence exists, and must consider evidence that both supports and undermines the
12 ALJ’s decision. *Id.* at 523. In weighing the evidence and making findings, the ALJ must
13 also apply the proper legal standards. *Id.* (citing *Bray v. Comm’r of Soc. Sec. Admin.*,
14 554 F.3d 1219, 1222 (9th Cir. 2009); *Benton v. Barnhart*, 331 F.3d 1030, 1035 (9th Cir.
15 2003)).

16 **IV. ANALYSIS**

17 The R&R addressed two issues that Martin had raised on appeal. First, Martin
18 alleged that the ALJ improperly discounted her treating physician’s opinion on her
19 potential absenteeism. Second, she claimed that the ALJ wrongly discredited her
20 subjective complaints of pain. The R&R found that the ALJ’s decision was supported by
21 substantial evidence and that the ALJ did not commit legal error. (ECF No. 28 at 13.)

22 In her objection to the R&R, Martin argues that the ALJ failed to articulate a
23 specific and legitimate reason for rejecting portions of Dr. Willoughby’s opinion (ECF No.
24 29 at 5), and that the ALJ failed to articulate clear and convincing reasons for
25 discounting her subjective complaints. (*Id.* at 6-9.) The Commissioner counters that the
26 ALJ’s assessments of both the medical evidence and Martin’s credibility were supported
27 by substantial evidence and free of harmful legal error. The Court will address Martin’s
28 objections in turn.

A. Medical Opinion of Dr. Willoughby

Martin contends that the ALJ failed to articulate a specific and legitimate reason for rejecting portions of testimony from her treating physician, Dr. Willoughby, regarding her need to miss work for medical reasons. (ECF No. 29 at 4 (citing ECF No. 14-1 at 322).) Instead, she argues, the ALJ provided a summary of the facts and conflicting evidence only with respect to Martin's credibility, and not for Dr. Willoughby's opinion. (*Id.* at 4.) Martin thus insists that the R&R erred in concluding that the ALJ adequately addressed Dr. Willoughby's opinion.

While it is true that the ALJ may disregard the opinions of medical experts, the ALJ must articulate the rejection and the reasons for doing so. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989); see also *Garrison v. Colvin*, 759 F.3d 995, 1012 (9th Cir. 2014). "[A]n ALJ errs when he rejects a medical opinion or assigns it little weight while doing nothing more than ignoring it, asserting without explanation that another medical opinion is more persuasive, or criticizing it with boilerplate language that fails to offer a substantive basis for his conclusion." *Garrison*, 759 F.3d at 1012-13 (citing *Nguyen v. Chater*, 100 F.3d 1462, 1464 (9th Cir. 1996)). The ALJ, however, need not accept a physician's opinion if it is conclusory and is unsupported by clinical findings. *Magallanes*, 881 F.2d at 751. "The ALJ can meet this burden by setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings." *Id.* (quoting *Cotton v. Bowen*, 799 F.2d 1403, 1408 (9th Cir. 1986), *superseded by statute on other grounds as recognized in Bunnell v. Sullivan*, 912 F.2d 1149, 1154 (9th Cir. 1990)). A reviewing court, in turn, may draw "specific and legitimate inferences from the ALJ's opinion." *Id.* at 755.

Here, contrary to Martin's objection, the R&R highlighted specific evidence that the ALJ identified as undermining Dr. Willoughby's opinion. First, the Court considered that Social Security regulations do not require the ALJ to adopt a treating physician's opinions in their entirety. (ECF No. 28 at 8.) The Court further noted that the ALJ gave significant weight to statements from Dr. Willoughby and Dr. Prabju, the pulmonary

1 examiner, both of whom had personally examined Martin. (*Id.* (citing ECF No. 14-1 at
2 25).) The ALJ also acknowledged, but gave little weight to, claims from two other
3 medical professionals that found Martin capable of performing light work. (ECF No. 14-1
4 at 26.) The ALJ dismissed these medical opinions because they did not reflect Martin's
5 subjective complaints. (*Id.*) It can be inferred from this determination that the ALJ
6 properly considered each medical opinion in partially adopting Dr. Willoughby's opinion.

7 Second, the R&R found that the ALJ examined medical evidence that was
8 inconsistent with Dr. Willoughby's opinion on absenteeism. (ECF No. 28 at 8 (citing ECF
9 No. 14-1 at 25).) An ALJ may generally give greater weight to medical opinions that are
10 more consistent with the whole record. 20 C.F.R. § 404.1527(c)(4). As the R&R notes,
11 the ALJ reviewed Martin's medical records as a whole, noting that Martin experienced
12 many of the same symptoms before her alleged disability onset date. (ECF No. 28 at 8
13 (citing ECF No. 14-1 at 24-25).) Because Martin lost her job due to layoffs and not her
14 disability, the ALJ inferred that Martin's impairments did not prevent her from performing
15 her work. (*Id.* (citing ECF No. 14-1 at 25).) In short, despite her medical conditions,
16 Martin was able to do her job at the time of her business-related layoff. (*Id.* (citing ECF
17 No. 14-1 at 25).) Accordingly, the ALJ reviewed Martin's medical records and provided
18 his reasons for discounting Dr. Willoughby's opinion on absenteeism.

19 Despite the evidence discussed in the R&R and the ALJ's opinion, Martin insists
20 that the ALJ failed to recite specific reasons for rejecting the absenteeism portion of Dr.
21 Willoughby's opinion. That opinion appears on a form that Dr. Willoughby filled out in
22 December 2010. (See ECF No. 14-1 at 318.) Dr. Willoughby indicated that Martin's
23 medical condition was likely to cause her to have good and bad days, which could result
24 in missing "[a]bout three days per month" of work. (*Id.*) Martin objects that the ALJ's
25 failure to discuss this absenteeism opinion means that the Court cannot meaningfully
26 review the ALJ's decision. (ECF No. 29 at 5 (citing *Brown-Hunter v. Colvin*, 806 F.3d
27 487, 494 (9th Cir. 2015) ("A clear statement of the agency's reasoning is necessary
28 because we can affirm the agency's decision to deny benefits only on the grounds

1 invoked by the agency.”)).) But as noted above, the ALJ thoroughly summarized Martin’s
2 medical condition and the basis for his inference that, even with her impairments, Martin
3 was able to work when she lost her job. To the extent that Dr. Willoughby’s absenteeism
4 opinion conflicts with the other medical evidence, the ALJ cited sufficient evidence to
5 discount the absenteeism opinion. (See ECF No. 14-1 at 24-25.) Martin’s objections with
6 regard to Dr. Willoughby’s opinion are therefore overruled.

7 **B. Plaintiff’s Testimony**

8 Martin also argues that the ALJ failed to articulate clear and convincing reasons
9 for discrediting her testimony on her symptoms. (ECF No. 29 at 6.) The ALJ found that
10 Martin’s credibility concerning her symptoms was diminished based on her (1) daily
11 activities, (2) conservative medical treatment, (3) non-compliance with her prescribed
12 medical treatment, (4) work record, and (5) a lack of support in the record for her
13 subjective symptoms. (ECF No. 14-1 at 22, 24-26.) The R&R addressed each of these
14 claims and determined that the ALJ’s credibility finding was supported by substantial
15 evidence. (ECF No. 28 at 10-13.) Martin refutes each of these findings and claims that
16 the ALJ did not provide sufficient rationale for his decision to reject her subjective
17 symptom testimony.

18 “The ALJ is responsible for determining credibility.” *Meanel v. Apfel*, 172 F.3d
19 1111, 1113 (9th Cir. 1999) (quoting *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.
20 1995)). The ALJ must first “determine whether the claimant has presented objective
21 medical evidence of an underlying impairment ‘which could reasonably be expected to
22 produce the pain or other symptoms alleged.’” *Lingenfelter v. Astrue*, 504 F.3d 1028,
23 1036 (9th Cir. 2007) (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 344 (9th Cir. 1991) (en
24 banc)). “If the claimant meets the first test and there is no evidence of malingering, the
25 ALJ can only reject the claimant’s testimony about the severity of the symptoms if she
26 gives ‘specific, clear and convincing reasons’ for the rejection.” *Vasquez v. Astrue*, 572
27 F.3d 586, 591 (9th Cir. 2008) (quoting *Lingenfelter*, 504 F.3d at 1036). An ALJ’s findings
28 are supported by substantial evidence if they are “sufficiently specific to allow a

1 reviewing court to conclude the adjudicator rejected the claimant's testimony on
2 permissible grounds and did not 'arbitrarily discredit a claimant's testimony regarding
3 pain.'" *Bunnell*, 947 F.2d at 345-46 (quoting *Elam v. R.R. Ret. Bd.*, 921 F.2d 1210, 1215
4 (11th Cir. 1921)). "[T]he claimant is *not* required to show 'that her impairment could
5 reasonably be expected to cause the severity of the symptom she has alleged; she need
6 only show that it could reasonably have caused some degree of the symptom.'" *Garrison*,
7 759 F.3d at 1014 (quoting *Smolen v. Chater*, 80 F.3d 1273, 1282 (9th Cir.
8 1996)). The ALJ may not reject subjective pain testimony "on the sole ground that it is
9 not fully corroborated by objective medical evidence[.]" *Rollins v. Massanari*, 261 F.3d
10 853, 857 (9th Cir. 2001).

11 Martin objects that a claimant's daily activities are not typically grounds to
12 discredit a claimant. (ECF No. 29 at 6-7 (citing *Lewis v. Apfel*, 236 F.3d 503, 516 (9th
13 Cir. 2001)).) She therefore takes issue with the ALJ's reasoning that Martin's daily
14 activities were inconsistent with her testimony on her symptoms. (*Id.*; see ECF No. 14-1
15 at 24-25.) Indeed, despite her symptoms, the ALJ found that Martin drives, goes grocery
16 shopping, reads an e-reader for several hours a day, and uses a computer for
17 approximately two hours a day. (ECF No. 14-1 at 24-25.) The Commissioner insists that
18 the ALJ may consider these daily activities in evaluating Martin's credibility. (ECF No. 19
19 at 9 (citing *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007) (daily activities may bear on
20 credibility when they contradict a claimant's testimony, or when they "meet the threshold
21 for transferable work skills"))).

22 Martin's reliance on *Lewis v. Apfel* is misplaced. There, the Ninth Circuit reasoned
23 that the "ALJ should not consider activities like taking care of oneself, household tasks,
24 hobbies, school attendance, club activities, or social programs to be substantial gainful
25 activities." *Lewis*, 236 F.3d at 516. But in assessing whether such activities might qualify
26 as gainful and substantial, the court did not suggest that daily habits were off-limits for
27 credibility determinations. See *id.* The Ninth Circuit, in contrast, has held that an ALJ
28 may consider daily activities in evaluating the claimant's credibility. *Tommasetti v.*

1 *Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008). Here, the ALJ discredited Martin's pain
2 testimony in part because her daily activities were inconsistent with her testimony
3 regarding frequent dizziness associated with her pulmonary hypertension. (ECF No.
4 14-1 at 24.) Her daily activities also required some of the same physical and mental
5 abilities "as those necessary for obtaining and maintaining employment." (*Id.* at 25.)
6 Since Martin's daily activities were inconsistent with her subjective pain testimony, the
7 ALJ assumed that Martin was not entirely credible. Martin's objection fails to
8 demonstrate how this reasoning is improper.

9 Next, Martin argues that the ALJ cannot discount her testimony due to her
10 conservative medical treatment because the ALJ never articulated what more aggressive
11 treatments — assuming they exist — she should have undergone. (ECF No. 29 at 7). As
12 the R&R points out, however, conservative treatment alone may be sufficient to discount
13 a claimant's credibility. (ECF No. 28 at 11 (citing *Parra v. Astrue*, 481 F.3d 742, 750-51
14 (9th Cir. 2007)).) Moreover, although the ALJ summarized Martin's treatment history, the
15 absence of aggressive treatment was one of several bases for discounting Plaintiff's
16 testimony. The ALJ stated that the medical record "casts doubt on the credibility of
17 claimant's allegations," but went on to specify that, according to the medical record,
18 Martin was able to perform her job adequately even with her symptoms and treatment.
19 (ECF No. 14-1 at 25.) The ALJ also pointed out that medication alleviated some of
20 Martin's symptoms. (*Id.* at 24-25.) The Court will not reject the R&R because of the ALJ's
21 consideration of Martin's treatment.

22 Martin further objects to the ALJ's reasoning regarding her compliance with her
23 treatments. (ECF No. 29 at 7.) The ALJ found that Martin was not fully compliant
24 because she did not wear a CPAP machine as recommended. (ECF No. 14-1 at 22.)
25 Martin claims that the ALJ could consider her lack of compliance as discrediting only if
26 the treatment was expected to restore her capacity to engage in substantial and gainful
27 employment, and if her failure to follow the treatment was unjustified. (ECF No. 28 at 7-8
28 (citing SSR 82-59).) Martin argues that there is no evidence demonstrating that use of

1 the CPAP machine would alleviate her sleep apnea and allow her to perform substantial
2 and gainful employment. (ECF No. 29 at 8.) Citing Martin's medical records, however,
3 the ALJ explained that the CPAP "should help alleviate her sleep apnea." (ECF No. 14-1
4 at 22 (citing ECF No. 14-1 at 612).) More important, although the R&R is correct in
5 pointing out that the ALJ discussed Martin's non-compliance, the ALJ's discussion of the
6 CPAP appears in a section describing Martin's severe impairments. (*Id.* at 22.) Martin's
7 noncompliance with her recommended CPAP use thus appears to have factored into the
8 ALJ's determination that Martins' sleep apnea — in addition to several other medical
9 conditions — did not qualify as a severe impairment. Martin's objection regarding the
10 CPAP compliance is accordingly overruled.

11 Martin also contends that the ALJ failed to consider why she stopped working
12 when he determined that her work record weighed against her credibility. (ECF No. 29 at
13 8.) The ALJ found that Martin experienced the same disabling impairments between
14 April 2005 and her alleged disability date in October 2010. (ECF No. 14-1 at 24.) Since
15 Martin conceded that she was terminated in October 2010 because of business-related
16 layoffs, the ALJ inferred that Martin's impairments would not prevent her from performing
17 that job. (*Id.* at 25.) Instead, even in light of her impairments — and absent evidence of
18 further deterioration over time — Martin was able to perform her work adequately. (*Id.*)
19 The R&R noted that it is proper for the ALJ to consider a claimant's work record in
20 making credibility determinations. (ECF No. 28 at 12); see *Drouin v. Sullivan*, 966 F.2d
21 1255, 1258-59 (9th Cir. 1992). Martin testified that she was laid off — despite her
22 seniority status — because she was slower than other employees. (ECF No. 29 at 8
23 (citing ECF No. 14-1 at 45).) Also, Martin stated that she experienced frequent dizziness
24 at work when she was asked to get up to file documents. (ECF No. 14-1 at 60.) Despite
25 this testimony, Martin has not demonstrated that the ALJ's inference regarding her work
26 record — that she was laid off due to business reasons — was unreasonable. Her
27 objection is overruled.

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1 Martin further alleges that she would have stopped work for reasons related to her
2 disability. (ECF No. 29 at 8.) Indeed, Martin testified she was only working because she
3 needed the medical insurance. (ECF No. 14-1 at 46.) But Martin's claims are speculative
4 — other than Martin's own testimony, they lack support from the record. Moreover,
5 Martin appears to have raised these claims only in her objection to the R&R, despite
6 having opportunities to raise them earlier on appeal. The ALJ properly considered
7 Martin's work record in evaluating her credibility.

8 Finally, Martin objects to the ALJ's reliance on the lack of objective evidence as a
9 basis for discounting her credibility. (ECF No. 29 at 9.) Martin is correct that a "lack of
10 medical evidence cannot form the sole basis for discounting pain testimony." *Burch v.*
11 *Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005). But such a lack of medical evidence "is a
12 factor that the ALJ can consider in his credibility analysis." *Id.* Here, as discussed in the
13 R&R, the lack of medical evidence was one of several factors that the ALJ considered
14 before discounting Martin's testimony. (ECF No. 28 at 12 (citing ECF No. 14-1 at 24-
15 26).) Thus, the ALJ properly considered the lack of medical evidence in his credibility
16 determination of Martin's testimony.

17 The Court finds that the ALJ provided clear and convincing reasons for finding
18 Martin's testimony less than entirely credible. Martin's objections about the ALJ's
19 credibility determination are accordingly overruled.

20 **V. CONCLUSION**

21 It is therefore ordered that the Report and Recommendation of Magistrate Judge
22 Nancy J. Koppe (ECF No. 28) is accepted and adopted in full. Defendant Commissioner
23 Carolyn W. Colvin's Cross-Motion to Affirm (ECF No. 20) is granted. Plaintiff's Motion to
24 Reverse and/or Remand (ECF No. 15) is denied.

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1 The Clerk is directed to enter judgment in accordance with this Order and close
2 the case.

3 DATED THIS 28th day of June 2016.

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6 MIRANDA M. DU
7 UNITED STATES DISTRICT JUDGE
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